

**COMMONWEALTH OF MASSACHUSETTS**

**DEPARTMENT OF  
INDUSTRIAL ACCIDENTS**

**BOARD NO. 027542-01**

Ana Vasquez  
Sweetheart Cup Co.  
Lumbermen's Mutual Casualty Co.

Employee  
Employer  
Insurer

**REVIEWING BOARD DECISION**

(Judges Carroll, McCarthy and Horan)

**APPEARANCES**

A. Ninoska Rosado, Esq., for the employee  
George D. Kelly, Esq., for the insurer at hearing  
Michael P. Mahany, Esq., for the insurer on appeal

**CARROLL, J.** The insurer appeals an administrative judge's decision awarding the employee a closed period of weekly § 35 temporary partial incapacity benefits and ongoing weekly § 34 temporary total incapacity benefits. The insurer argues that, though it raised § 1(7A) and produced evidence of a pre-existing condition, the judge failed to apply the heightened causation standard of § 1(7A). We disagree that the judge was required to evaluate the case under § 1(7A), and affirm the decision.

Ana Vasquez, a 43-year-old native of El Salvador, worked for the employer as a packer, filling and lifting boxes weighing up to 38 pounds every five minutes. (Dec. 3.) While at work on July 24, 2001, she slipped and fell, injuring her low back and left knee. (Dec. 3-4.) Ms. Vasquez treated with a number of medical providers, undergoing physical therapy, chiropractic care, and epidural injections. In addition, she was prescribed pain medications and muscle relaxants. (Dec. 4, 6.) At the time of the hearing, she claimed to be in pain all the time, with the back pain being so severe that, once or twice a day, it rendered her unable to walk. (Dec. 4.)

The insurer paid § 34 temporary total incapacity benefits from July 25, 2001 to October 12, 2001, after which the employee filed a claim seeking further benefits. Following a § 10A conference, an administrative judge ordered the insurer to pay § 35 benefits from October 13, 2001 through April 8, 2002. Both parties appealed to a de novo hearing. (Dec. 2.)

The § 11A physician, Dr. Joseph Abate, who examined the employee on June 6, 2002, diagnosed her with 1) multiple contusions resolved; 2) recent pregnancy<sup>1</sup>; and 3) symptom magnification. He opined that she had been totally disabled due to her fall at work from July 24, 2001, to, at most, September 7, 2001, the approximate time of her examination by the insurer's expert and her first visit to Dr. Dane, a chiropractor. Dr. Abate did not rule out some partial disability, but could not say how long it lasted, other than that it had ended by the time of his examination. He thought that any findings reflected in her April 19, 2002, MRI were "more likely related to age than to any trauma." (Dec. 5, 7-8.)

Dr. Abate's report and deposition testimony were admitted as evidence. Based on the complexity of the medical issues, the judge allowed the employee's motion to submit additional medical evidence. (Dec. 2.) The employee offered records of her treatment from a number of medical providers, including her treating orthopedist, Dr. Awbrey, as well as the MRI report of April 19, 2002. The insurer submitted the September 5, 2001, report of its examining physician, Dr. Kevin Bozic. (Dec. 1.)

At hearing, the insurer raised the defense of § 1(7A),<sup>2</sup> alleging that Dr. Abate's opinion that the employee's condition was related more to age than

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<sup>1</sup> Ms. Vasquez was approximately three months pregnant at the time of her accident, and delivered a baby by Caesarian section in February 2002. (Tr. 18; Employee Exh. 3 [February 8, 2002 report of Dr. Aubrey]).

<sup>2</sup> G.L. c. 152, § 1(7A) provides, in relevant part:  
If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be

trauma constituted evidence of a pre-existing back condition. In his decision, the judge stated that he was “unconvinced by Dr. Abate’s conclusion that the [employee’s] complaints were the product of symptoms magnification and wary of the way in which he wrote off [ ] the MRI findings.” (Dec. 9.) He rejected the § 11A opinion and instead adopted the opinion of the employee’s treating orthopedist, Dr. Awbrey, and that of Dr. Polykoff, a specialist in rehabilitative medicine, that the employee had a more serious disabling disc condition. The judge found that though the employee had a period of partial recovery in the fall of 2001, the “early optimism” engendered by that improvement was not borne out, and the employee’s condition deteriorated to total incapacity by December 5, 2001, when Dr. Awbrey first saw her. (Dec. 6, 8.) Accordingly, the judge awarded the employee § 35 benefits from October 13, 2001, through December 4, 2001, and § 34 benefits thereafter. (Dec. 11.)

At the crux of the medical disagreement is the interpretation and importance of the employee’s April 19, 2002 MRI. Dr. Abate opined that it was an essentially “normal” report, showing age-related changes. (Dec. 5; Dep. 15.) Dr. Awbrey, however, interpreted the MRI as demonstrating a broad-based left-sided disc protrusion/herniation at L4-5 with moderate left L4 neural foraminal stenosis, and an L5-S1 disc herniation with right S1 neural abutment and mild bilateral L5 neural foraminal stenosis, causally related to the work accident and totally disabling the employee. (Dec. 6; Employee Exh. 3.) Adopting Dr. Awbrey’s opinion, the judge found:

*Dr. Aubrey [sic] made no mention of there being any contribution from any pre-existing condition to the present state of the back diagnoses or the disability. He stated straightforwardly that the cause of the back condition was the work accident. Having adopted his opinion, and having rejected Dr. Abate’s with respect to the employee’s conditions and the cause(s) of the conditions diagnosed, I find that I do not have to reach a § 1(7A) question. Section 1(7A) comes into play only where the industrial injury*

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compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

*combines with a pre-existing condition in creating the disability, and, here, the adopted opinion of Dr. Aubrey makes no mention of anything else combining with the industrial injury in causing the disability.*

(Dec. 9-10.)(Emphasis added.)

The insurer argues on appeal that, because it raised the defense of § 1(7A), and produced some evidence of a pre-existing condition that could combine with the work injury - in the form of Dr. Abate's opinion that the employee's condition was more likely related to age than to trauma, - the employee was required to prove that her injuries were "a major cause" of her disability and need for treatment.<sup>3</sup> (Insurer br. 5.)

The insurer's argument ignores the requirement that the judge must find that "a pre-existing condition, which resulted from an injury or disease not compensable under this chapter" *combines* with the work injury. See G.L. c. 152, § 1(7A). Though the insurer arguably produced some evidence of a pre-existing condition through Dr. Abate's opinion that "age rather than any trauma" caused any findings in her MRI report<sup>4</sup> (Dec. 5), the judge was not persuaded that the alleged condition combined with her undisputed work injury of July 24, 2001. Instead, he was persuaded by and adopted Dr. Awbrey's unequivocal opinion that

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<sup>3</sup> The insurer also argues that the employee's intervening pregnancy may have been the cause of her symptoms and inability to work. (Insurer br. 5.) However, where the judge has found that the employee suffered an industrial injury, her subsequent pregnancy does not break the causal chain between work and the employee's incapacity. Bemis v. Raytheon Corp., 15 Mass. Workers' Comp. Rep. 408, 412-413 (2001).

<sup>4</sup> We do not address whether the pre-existing condition alleged by the insurer resulted from an "injury or disease" as required to trigger the application of § 1(7A), but simply point out that not all pre-existing conditions require § 1(7A)'s application. See Blais v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. 187 (2003) (employee's degenerative disc condition normal for a person of her age - age not a pre-existing illness or disease, therefore first element of § 1(7A)'s application missing); Errichetto v. Southeast Pipeline Contractors, 11 Mass. Workers' Comp. Rep. 88, 91 (1997) (age cannot be considered as a § 1(7A) "pre-existing condition"); Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79 (2000) (§ 1(7A) inapplicable because there was no medical evidence that obesity is a "disease").

“the cause” of the employee’s back condition was the work injury. (Dec. 10.) As a result, the judge correctly analyzed the employee’s ongoing incapacity under the simple causation standard.<sup>5</sup> See Cook v. Stop & Shop Co., 15 Mass. Workers’ Comp. Rep. 252, 258 (2000); Fairfield v. Communities United, 14 Mass. Workers’ Comp. Rep. 79, 82 (2000).

Thus, the judge did not err in applying the simple “as is” causation standard in evaluating the case. Since the opinion of Dr. Awbrey, which he was free to adopt over that of the § 11A examiner, see Blais, *supra* at 191, clearly satisfies this causation standard, we affirm the judge’s decision.

Pursuant to § 13A(6), the employee’s attorney is awarded a fee of \$1,312.21.

So ordered.

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Martine Carroll  
Administrative Law Judge

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William A. McCarthy  
Administrative Law Judge

Filed: **January 25, 2005**

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Mark D. Horan  
Administrative Law Judge

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<sup>5</sup> In Cook, *supra*, we noted that the judge had erred by relying on the opinions of medical experts who were either unaware of or did not opine regarding the effects of a pivotal prior non-work-related motor vehicle accident. *Id.* at 258-259. The facts in Cook are distinguishable from those in the instant case. Here, there was no historical inaccuracy, merely a disagreement between Dr. Abate and Dr. Awbrey as to how the MRI should be interpreted in light of their different physical findings.